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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 659

FRANK ROSS,

Petitioner,

vs.

F. E. STANLEY, et al.,

Respondents.

BRIEF FOR RESPONDENT HARBERT CONSTRUCTION CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

We submit this brief for respondent Harbert Construction Corporation, one of several defendant-appellees below, in opposition to the petition of Frank Ross, plaintiff-appellant below, for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit of June 1, 1965 and order denying rehearing of July 13, 1965.

Opinions Below

The opinion of the District Court, Middle District of Florida (R 127)* has not been printed. The opinion of the Court of Appeals, Fifth Circuit, is reported at 346 F. 2d 645.

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*Citations to pages of the record below are prefaced by the letter "R."

Statement of the Case

This case was instituted by complaint filed August 3, 1962 (R 15), which complaint was later amended and refiled as a "Second Amended Complaint" on February 6, 1963 (R 44). The nature of the case is a derivative stockholder's suit which was brought in the District Court on the sole basis of diversity of citizenship and jurisdictional amount (R 44).

A clear and succinct statement of the essential facts in this case appears in Chief Judge Tuttle's opinion for the Court of Appeals (see 346 F. 2d 646-649), and we shall not spell out the facts nor detail the pleadings here. As to the pleadings, it is sufficient to say here that the pleading of petitioner which was tested below was his "Second Amended Complaint," referred to hereinafter simply as "the complaint." It occupies forty pages of the printed record (R 44-83) and involves a great multiplicity of allegations of fact, conclusions of law and characterizations of rights.

In the proceedings below, the respondents filed various motions (R 119-127), including motions to dismiss based upon failure to state a claim upon which relief can be granted and upon the bar of the statute of limitations.

The District Court on September 30, 1963, entered an order dismissing the complaint (R 127). In its dismissal opinion, the District Court characterized the complaint as being "based upon two theories of recovery" (R 128). The Court never reached the question of whether these theories, either separately or together, constituted the statement of a cause of action. It merely found that the claim for damages was barred by limitations and that the claim of unjust enrichment, as theorized in the complaint, was premature.

From this order of dismissal the petitioner appealed

(R 134). When he did so, he appealed the entire order (with an exception not here relevant), specifically claiming that the District Court "erred in holding the claim for unjust enrichment to be premature" (R 135).

On appeal, the Court of Appeals for the Fifth Circuit held that petitioner's claim for breach of fiduciary duty and his claim for unjust enrichment were one and the same, and that the entire lawsuit was barred by limitations. *Ross v. Stanley,* 346 F. 2d 645 (5th Cir. 1965).

Petitioner has now filed his Petition for Writ of Certiorari, which we oppose with the reasons and authorities set out hereinbelow.

REASONS FOR DENYING THE WRIT

We submit that the said Petition makes no showing of special and important reasons which call for an exercise by the Supreme Court of its sound judicial discretion, and that none of the reasons set out in United States Supreme Court Rule 19(b) is present in this case.

I

A. There is no important federal question involved in the dismissal of the complaint below. Such dismissal involves nothing more than a determination of the applicability of a state statute of limitations.

B. There is no important state question which has been decided in a way in conflict with applicable state laws in the dismissal of the complaint below.

No federal question is presented. This case is a stock-

holder's derivative suit, filed in federal court only because of diversity of citizenship.

The law has long been clear that such suits are governed by local law. *Swanson v. Traer,* 354 U.S. 114 (1957). This rule extends to questions of the applicable statute of limitations. *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945).

Throughout this case in the courts below, the parties have been in agreement that the three-year statute of limitations imposed by Section 95.11(5), Florida Statutes, is determinative of the timeliness of petitioner's complaint. The Court of Appeals, in its opinion below in this case, observed,

> ". . . The trial court expressly ruled, and the parties both concede in this Court, that the Florida three-year statute of limitations is available as a defense if it applies under the pleaded facts." *Ross v. Stanley,* 346 F. 2d 645, 648 (5th Cir. 1965).

The only question in the case below was as to the time at which the period of limitations, under Florida law, began to run.

The Court of Appeals said on this point,

> "All parties seem to agree that 'limitation never commences to run until the time when the plaintiff could first have maintained his action to a successful result.' *Brownell v. City of St. Petersburg,* 5 Cir., 1942, 128 F. 2d 721, 724. . . ." Ibid.

The Court, through Chief Judge Tuttle, then proceeded to find that, however many ways petitioner may have stated his claim, he really had stated only one claim; that he could have maintained an action on his stated claim in November, 1958, and that his claim was therefore barred at the time his complaint was filed on August 3, 1962. Id. at 649.

Before going further into how the Court of Appeals decided the time at which the Florida period of limitations began to run and why its construction of state law was correct, we turn to petitioner's efforts to graft some element of federal question onto this question of purely local law.

The petitioner takes the position that his claims are "an essential ingredient of the regulatory scheme of the Natural Gas Act and the Federal Power Act" (Petition for Writ, p. 10), and that the decision below "defeats the policy" of those laws (Petition for Writ, p. 13).

We submit that neither the Natural Gas Act nor the Federal Power Act confers any private rights on petitioner and none are claimed in his complaint. It is true that his stockholder's derivative suit is related to, and apparently was prompted by, a proceeding of the Federal Power Commission, but neither the Acts referred to nor any proceeding of the Commission can confer any private rights upon petitioner.*

Indeed, neither the District Court nor the Court of Appeals attempted to make any decision as to the merits of petitioner's rights. Thus, even if one were to take at face value petitioner's contention that his claims are essential to the "regulatory scheme" of certain federal acts which by their terms confer no private rights upon him—a doubtful

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*The principles (1) that no private cause of action is created by a federal statute in the absence of a specific provision therefor in the statute itself, and (2) that rulings of administrative bodies do not create private rights, are supported by the following authorities:

(1) Regents of University System of Georgia v. Carroll, 338 U.S. 586 (1950).
(2) T.I.M.E. Inc. v. United States, 359 US. 464 (1959).
(3) Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137 (1960).
(4) Tyler Gas Service Co. v. United Gas Pipe Line Co., 217 F. 2d 73 (5th Cir. 1954).
(5) McDow v. Louisiana Southern Ry. Co., 219 F. 2d 650 (5th Cir. 1955).
(6) Otis & Co. v. Pennsylvania R. Co. (ED Pa. 1945), 61 F. Supp. 905, affirmed 155 F. 2d 522 (3rd Cir. 1946).

proposition at best—there has been no determination of federal rights in this case and no federal question is presented at all. What the Court of Appeals decided was that, whatever petitioner's rights might be in a timely case, he cannot maintain an action that, under the law clearly applicable to the question of timeliness, is barred by limitations.

The state law of limitations was decided correctly. In holding that petitioner's entire claim was barred by the Florida statute of limitations, the Court of Appeals, through Chief Judge Tuttle held,

> "The circumstances alleged to have existed at the time the contracts were executed in November, 1958, unquestionably would have supported a bill in equity for an accounting based on a breach of the fiduciary relationship resulting in injury, the damages from which could not be computed until a later date. Such an action for accounting from allegedly faithless fiduciaries is fully recognized in Florida. R. O. Holton & Co. v. Hull, 1939, 104 Fla. 687, 192 So. 229. In Royal Indemnity Co. v. Knott, Fla. 1931, 136 So. 474, 478, the Supreme Court of Florida said '[a]nd it may be said generally that whenever there is a fiduciary relation such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted. The right in such cases is based upon the substantive equity of trusts which jurisdiction equity always had. 1 Ency. Pl. & Pr. 96.' In point of fact, this is precisely the suit that the plaintiff has brought in this case." *Ross v. Stanley,* supra at 649.

Petitioner claims that no harm had been done to Florida Gas Company and Florida Gas Transmission Company in 1958. For this proposition he depends upon *Town of Miami Springs v. Lawrence,* 102 So. 2d 143 (Fla., 1958), wherein each flooding caused by a dike, the construction of which was not of itself a wrong, was held to be a new trespass, and

United States v. Reid, 251 F. 2d 691 (5th Cir. 1958), involving another special situation—the slow development of tuberculosis as a result of negligent medical advice.

The authorities depended upon by petitioner do not represent the general rule of Florida law, which is applicable to this case. The general rule is that the statute begins to run at the first moment that a cause of action accrues. *Cristiani v. City of Sarasota,* 65 So. 2d 878 (Fla., 1953); *Brownell v. City of St. Petersburg,* 128 F. 2d 721 (5th Cir. 1942). Since an action for accounting (or a correlative remedy—declaratory relief, injunction, the affixing of a constructive trust, etc.) could have been brought at the time the 1958 contracts were let, the statute began to run no later than at that time. *R. O. Holton & Co. v. Hull,* 140 Fla. 687, 192 So. 229 (1939); *Royal Indemnity Co. v. Knott,* 136 So. 474 (Fla., 1931).

Conclusion: We submit that the Court of Appeals has not decided any federal question at all, and that it has decided a state question—a question of application of the Florida statute of limitations—in a way not in conflict with applicable state law. There is nothing new or novel about the decision. Of course the subject matter is important to the parties, but the decision sets no precedent. It merely reaffirms the existing law that, in a diversity action in a United States District Court, the limitation to be applied is determined under state law.

II

The modification of the District Court's decision by the Court of Appeals does not depart from the accepted and usual course of judicial proceedings so as to call for exercise of this Court's supervisory power.

Petitioner argues that the District Court, by dismissing petitioner's "profit" claim without prejudice, "preserved petitioner's right to renew his action after the FPC's decision of the rate base proceeding becomes final." He objects that, "although only petitioner appealed, the Court of Appeals took away this right by directing that the claim be dismissed with prejudice" (Petition for Writ, p. 19).

We submit that the order of the Court of Appeals was properly within the role of an appellate court and did not depart from the accepted course of judicial proceedings. The District Court did not "preserve" to the petitioner any right to assert his unjust enrichment theory of recovery at some future date. It did not even reach the question of whether such theory stated a cause of action. It merely found the only claim that was, in its opinion, then maintainable to have been barred by limitations. The Court of Appeals determined that petitioner in fact had stated only one claim, and not two, and that his one claim was barred by limitations so that the entire litigation was due to be put at peace.

This occurrence could have come as no shock to petitioner. All the respondents were held by the District Court to have pleaded the bar of limitation to the entire complaint, and petitioner appealed the entire order and judgment of the District Court (R 134-135).

In such posture, the case was ripe for the Court of Appeals to construe the real nature of petitioner's claim. Chief Judge Tuttle, after a detailed analysis of the complaint, found petitioner's two claims to be "absolutely equivalent." *Ross v. Stanley,* supra at 650. Judge Simpson, concurring, said,

> "My agreement with the opinion prepared by Chief Judge for the Court is complete and without reservation."

* * *

"First, I would emphasize that the Complaint here sets forth only one claimed breach of legal duty; only one 'claim' or 'cause of action', not two; only one basis for recovery. The only duality I can discover is in theories of recovery and computation of damages.

"It is sophistry to assert the existence of two claims, one for 'breach of trust' and a separate claim for 'unjust enrichment', giving rise to an equitable right to an accounting.[1]"

* * *

"Our holding, in summary, is: that only one claim, not two, existed; that all, not part of it, was time-barred under the Florida statute when suit was brought; and that the district court's attempted dichotomy was impermissible, as without legal or factual basis.

"The judgment below was brought here on appeal, not just part of it, as Judge Rives argues, and the majority opinion simply directs that that judgment, now under our jurisdiction on appeal, be modified below to meet these views. Upon remand the suit will stand dismissed with prejudice, not with one portion of an indivisible whole dismissed with prejudice, and the remainder thereof dismissed without prejudice, as the district judge incorrectly attempted.[4]" [Footnotes not repeated here.] *Ross v. Stanley,* supra at 651-652.

There was no obligation on the part of respondents to cross-appeal. The judgment of the District Court was not adverse to them, and it guaranteed nothing to petitioner. On appeal, respondents could properly urge all matters appearing in the record in support of a judgment (*LeTulle v. Scofield,* 308 U.S. 415 (1940), and the Court could take notice of errors against the respondents. *Commercial National Bank in Shreveport v. Parsons,* 144 F. 2d 231, 240 (5th Cir. 1944); rehearing denied 145 F. 2d 191; cert. denied 323 U.S. 796.

The case just cited involved an equitable accounting. The point presently in question was treated precisely in the opinion of the Court of Appeals for the Fifth Circuit in that case:

> "Because it did not take a cross-appeal from a judgment reversed on direct appeal, the dissenting opinion would perpetuate an error against appellee committed on the original trial of this case. None of the authorities cited in the dissenting opinion supports this contention. There was but one final judgment in this case; the others were interlocutory. The appellant saw fit to appeal from the entire judgment, not from items or portions thereof as it might have done. Also, under Rule 75 (d), Rules of Civil Procedure, 28 U.S.C.A. following section 723c, it designated the entire record, proceedings, and evidence in the court below for inclusion in the record on appeal. Why should an appellate court, remanding for retrial an action involving an intricate equitable accounting, not notice a plain error against the appellee? Courts sit to do justice between the parties, not merely to decide points in a tilt between lawyers. We are not enlarging the appellee's rights under the judgment appealed from; we are reversing and annulling the judgment at the instance of appellant." *Commercial National Bank in Shreveport v. Parsons,* supra at 240.

The point was also discussed in another Fifth Circuit opinion, *Calhoun County, Fla. v. Roberts,* 137 F. 2d 130, 132 (5th Cir. 1943), as follows:

> "We acknowledge the general rule that a cross appeal or cross certiorari is necessary to enable an appellee or respondent in certiorari to ask the appellate court to reverse the part of a decree which is unfavorable to him. Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593. The rule was applied even to an admiralty decree, the appeal from which is a de novo trial, in The Maria Martin

(Martin v. Northern Transportation Co.), 12 Wall. 31, 20 L.Ed. 251. But in another case in admiralty, Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520, by way of considered dictum, it was declared that the rule is one of the practice generally followed, limiting the rights of litigants, but not a restriction on the power of the appellate court to see that justice is done. We are reversing the conclusion of law of the district judge that the recourse is against the County and we esteem it necessary to justice to reopen his conclusion of law that there was no recourse against any bond proceeds in the balance of the Construction Fund. We act on our own motion, and not at the instance of appellee. We have disturbed no fact finding of the district court (as was done in the Morley Construction Company case), but differing only on the law, we propose to apply in all its consequences the law as we see it. We hold we have the power, without cross appeal, to do this."

The action of the Court of Appeals in causing the entire complaint to be dismissed with prejudice is also clearly correct when scrutinized from a jurisdictional point of view. Under the applicable state law, "jurisdiction" is defined as "the power of a court to hear and determine a cause" *(State v. Sullivan,* 95 Fla. 191, 116 So. 255, 263 (1928), and as "the right to adjudicate concerning the subject-matter in the given case." *Johnson v. McKinnon,* 54 Fla. 221, 45 So. 23, 26 (1907). It has also been stated that, "technically, jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit." *Malone v. Meres,* 109 So. 677, 684 (Fla. 1926). Thus in order to have jurisdiction over a controversy, the court must have the power or authority to adjudicate or determine the controversy between the parties.

If the statute of limitations was properly pleaded in bar of petitioner's whole claim, then the District Court had no further jurisdiction to deal with the subject matter, and any

comments that it made about a separate claim of unjust enrichment should have been noted and corrected on appeal. *Lang v. Patent Tile Company, Inc.*, 216 F. 2d 254 (5th Cir. 1954).

The Court of Appeals for the Fifth Circuit held, in the case just cited (opinion by Judge Rives),

> "Defects of the District Court's jurisdiction which are apparent on the face of the record must be noted by this Court *sua sponte*. Mansfield C. & L.M. Railway Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462; Clark v. Paul Gray, Inc., 306 U.S. 583, 588, 59 S.Ct. 744, 83 L.Ed. 1001; Fennell v. John Hancock Mutual Life Ins. Co., 5 Cir., 177 F. 2d 737, 738; Riley v. Titus, 89 U.S. App. D.C. 79, 190 F. 2d 653, 655." *Lang v. Patent Tile Company, Inc.*, supra at 254.

On the basis of these principles, we submit that, if one of petitioner's theories was not in fact a claim, the appellate court had the power and the duty, without cross appeal, to note the error and to deal with it. Furthermore, if the error involved a controversy or a facet of the cause that was beyond the jurisdiction of the trial court, the appellate court was obligated to note the point *sua sponte*. Any other course of judicial administration would have been manifestly inefficient and unjust.

CONCLUSION

For the reasons given, respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of this brief, with air mail postage prepaid, to William E. Haudek, Esq., Pomerantz, Levy, Haudek & Block, Esqs., 295 Madison Avenue, New York, N. Y., 10017, and Charles Jay Hardee, Jr., Esq., Hardee, Ott & Hamilton, Esqs., 101 East Lafayette St., Tampa, Florida, on this 5th day of November, 1965.

John Bingham

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